No. 07-125

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STEVEN MATTES,

Petitioner,

v.

BALLY'S LAS VEGAS; PARIS HOTEL & CASINO; PARK PLACE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

The district court set aside a jury verdict in favor of the Petitioner after finding it was against the clear weight of evidence and unsupported by Nevada law, and summary judgment was entered in favor of the Respondents. Agreeing that Petitioner's claims were based on nothing more than his "conjectural testimony" and mischaracterized evidence, the Ninth Circuit Court of Appeals affirmed in an unpublished memorandum decision. Should this Honorable Court exercise its certiorari discretion to consider the Petitioner's claim that the Ninth Circuit "misapplied" Nevada law and "overlooked material facts" in this case, which involves issues important only to the Petitioner?

CORPORATE DISCLOSURE STATEMENT

The named Respondents are Park Place, Inc., Paris Hotel & Casino, and Bally's Las Vegas. Paris Las Vegas and Bally's Las Vegas are dbas of Parball Corporation ("Parball"). Parball is owned 100% by Harrah's Operating Company, which is owned 100% by Harrah's Entertainment, a publicly owned company. "Park Place, Inc.," is not actually an entity.

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STATEMENT OF THE CASE

Petitioner Steven Mattes ("Mattes") is a disgruntled gambler who, after losing millions of dollars during a 40+ hour blackjack streak at the 1999 opening of the Paris Hotel & Casino, contends that Paris's refusal to extend him additional credit – not merely his bad luck – prevented him from beating the house. Mattes claims Paris engaged in a vast conspiracy stretching from corporate executives to casino floor employees, but the real facts of this case are much more mundane. This case is really about one man's vainglorious disbelief that he could possibly lose in Las Vegas and his crusade to blame someone – anyone – else for his misfortune.

Mattes first blamed Paris, claiming his winnings were stolen from him through artfully-fraudulent casino accounting. After his case ended in summary judgment, Mattes blamed the district court, insisting that its rulings were the result of the court's personal dislike for him, not the meritlessness of his claims. And now that the Ninth Circuit has affirmed the district court's decision and refused en banc reconsideration, Mattes has shifted the blame to the appellate court and crudely repackaged his thrice-rejected arguments for a new audience.

But Mattes's superficial challenge to every factual conclusion in the Ninth Circuit's opinion falls short of justifying this Court's attention. Although Mattes characterizes portions of the Ninth Circuit's decision as "jurisdictional" errors in an effort to artificially infuse this case with public importance, the errors he alleges fall squarely into two categories: 1) misapplications of Nevada gaming law, and 2) overlooked facts. Neither of these case-specific, alleged errors justifies a writ of certiorari.

ARGUMENT

A. The Ninth Circuit's Application of Clear Nevada Law to the Facts of this Case Did Not Result in a "Fatal Jurisdictional Error."

Mattes cites as his first reason for granting the petition for certiorari a "fatal jurisdictional error" by the Ninth Circuit depriving him of "any jurisdiction for his conversion claim." The error, he claims, is the lower courts' conclusion that his conversion claim – which is based on Mattes's allegation that Paris falsified its accounting records to make it appear that he had lost millions of dollars when, in fact, he was winning – is a patron dispute that falls within the jurisdiction of the Nevada Gaming Control Board ("the Board"), not the federal courts. Nevada's comprehensive gaming laws give the Board exclusive jurisdiction to adjudicate disputes between patrons and casinos over "alleged winnings [and] alleged losses,"[1] but exclude from the Board's jurisdiction debts "evidenced by a credit instrument."[2] Mattes contends that the Ninth Circuit based its ruling on the erroneous premise that casino markers[3] do not qualify as credit instruments and thereby deprived him of any forum for his conversion claim. Mattes misstates the basis of the panel's ruling and grossly overstates its impact.

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[1] NEV. REV. STAT. § 463.362.

[2] NEV. REV. STAT. § 463.361.

[3] A marker is "a check that can be written at the gaming tables by a player who has established credit with the casino. An IOU." http://www.gamingtoday.com/Glossary.

1. The Ninth Circuit Did Not Discuss Credit Instruments.

Mattes's focus on the legal characterization of casino markers is based on either a complete misunderstanding or a blatant misrepresentation of the Ninth Circuit's decision. The circuit court was not under a mistaken legal impression that markers are not credit instruments – indeed, the question of whether markers are credit instruments did not factor into the court's analysis.[4] Instead the court properly applied its decision in *Erickson v. Desert Palace, Inc.*, which simply holds that "parties who assert they are owed a gaming debt, fraud or no fraud, are confined to the administrative process followed by state judicial review"[5] to conclude that Mattes's claim that Paris converted his winnings through forgery and fraud "falls squarely within the exclusive jurisdiction of the Nevada Gaming Control Board."[6]

Mattes conspicuously claims Paris owed him a gaming debt – he emphasizes, "[h]ere it is undisputed that [his] claims involved overcharges by the casino for alleged gaming debts."[7] But he turns Nevada law on its head to

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[4] Despite his convoluted allegations to the contrary, the "debt" Mattes claims Paris owes him is not "evidenced" by markers. The markers he's referring to are those he claims are forged, altered, falsified, and therefore totally unreliable. *See* Petition at 19-21 (arguing that the markers "were altered in order to increase the marker amounts allegedly due," and "were altered to create marker liability sufficient to offset Petitioner? [sic] winnings"). Mattes contends that *the falsity* of the markers – and the fact that they shouldn't exist at all – is the evidence of Paris's debt to him.

[5] Appendix at 9a (quoting *Erickson v. Desert Palace, Inc.*, 942 F.2d 694 (9th Cir. 1991)).

[6] *Id.*

[7] Petition at 5.

misrepresent to this Court, "Nevada law makes clear that Petitioner's claims are outside the exclusive jurisdiction of the Nevada Board and were properly brought in federal district court." It is *Erickson* that is clear: in Nevada, "suits to collect unpaid gambling winnings" fall within the exclusive jurisdiction of the Nevada Gaming Control Board.[8] Mattes's conversion claim is no exception, and the Ninth Circuit correctly found that "Mattes's claim falls clearly within this category, because he is attempting to recover a gaming debt allegedly owed, which he argues he legitimately won or would have won."[9]

2. An Adequate and Appropriate Forum Exists for Mattes's Conversion Claim.

Mattes's contention that the absence of federal court jurisdiction deprives him and "similar litigants of *any* forum to redress legitimate disputes"[10] against casinos is exaggeration to the point of fabrication. His real problem with the Ninth Circuit's decision is not that it leaves him without any forum, but that he prefers the federal court system to the administrative process. A preference

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[8] *Erickson*, 942 F.2d at 696.

[9] Appendix at 9a. Mattes also suggests that "the issue of the [Nevada Gaming Control] Board's jurisdiction should be certified and submitted to the Nevada Supreme Court for the correct interpretation of State law." Petition at 6. As Mattes never raised this argument below – and in fact, he vehemently contended that certification of this issue to the Nevada Supreme Court was improper – this Court should not consider it now. *See Youngberg v. Romeo*, 457 U.S. 307, 316 n. 19 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n. 1 (1977); *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Old Jordan Mining & Milling Co. v. Societe Anonyme des Mines*, 164 U.S. 261, 264-265 (1896).

[10] Petition at 6 (emphasis added).

for another forum, however, is not a deprivation of all remedies. By vesting jurisdiction over alleged gaming debts in the Board, Nevada gave gamblers a specific, knowledgeable forum for their claims: "the administrative process followed by state judicial review."[11] Casino patrons like Mattes have a forum for the redress of their disputes, and certiorari is not necessary.[12]

B. This Case Does Not Concern a Corporation's Duty to Preserve Evidence in the Face of a Pending Dispute Because There Is No Evidence That Mattes Notified the Casino that a Claim Was Imminent.

However "timely" or "extraordinarily important" this Court might consider a corporation's duty to preserve evidence when it knows or should have known of a pending dispute, this case does not implicate that duty. In yet another effort to inject this case with relevance beyond its own boundaries, Mattes claims that the Ninth Circuit's "opinion holds that, even in the face of evidence that a corporation had notice of imminent litigation ... the corporation has no obligation to preserve those records," giving this Court the opportunity "to clarify the law on destruction of evidence."[13]

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[11] *Erickson*, 942 F.2d at 697.

[12] Mattes's bald suggestion that review by this Court is necessary "to assure uniformity" of decisions is a red herring. This is a state law issue. This Court's oversight is not necessary or appropriate "to ensure a uniform application of [Nevada] law, and to avoid inconsistent rulings," Petition at 7, between the district courts within the Ninth Circuit.

[13] Petition at 8.

But the Ninth Circuit's opinion contains no comment about the corporate duty to preserve evidence. The panel only observed that the proof Mattes offered to support his spoliation theory failed to establish that Mattes notified Paris that he wanted the casino to preserve video tapes of his activities:

> As to Mattes's claim that there was fraud in destroying evidence and that [casino employees] misrepresented to him that tapes would be maintained and reviewed and that any errors would be corrected . . . the evidence does not support Mattes's contentions. Mattes cites a letter he sent to Paris complaining about his stay in September 1999, but Mattes did not mention destruction of evidence or request that any evidence be preserved in this letter. Mattes's other exhibits are likewise inapposite, as for instance Trial Exhibit 40, which is a *Hilton* document indicating that a certain tape "is saved," and not evidence that the Paris Casino destroyed tapes.[14]

Thus, the unpublished memorandum disposition only discusses the insufficiency of Mattes's evidence to prove destruction of evidence; it is silent as to the general scope or application of the law of corporate duty. Mattes's subjective belief that the lower courts' assessment of that evidence was faulty is not a "compelling reason" for this Court to grant certiorari.

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[14] Appendix at 4a.

C. A Writ of Certiorari Is Not Available to Review Overlooked Facts and Misapplied Law.

As his last point of error, Mattes contends that the Ninth Circuit panel ignored his inexpert analysis of highly-technical, casino accounting records when it concluded that the evidence fell substantially short of proving Mattes's claims. Mattes provides this Court with a 21-page regurgitation of more than a dozen arguments he presented to – and had rejected by – the lower courts. With this kitchen-sink approach, Mattes essentially asks this Court to conduct a document-by-document and claim-by-claim analysis of the 2,600-page record to arrive at a different conclusion than reached by both lower courts.

But that's not this Court's job. As this Court explained in *National Labor Relations Board v. Pittsburgh S.S. Co.*, the United States Supreme Court does not exercise its certiorari discretion to review evidentiary records for sufficiency:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. . . . In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."[15]

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[15] 340 U.S. 498, 503 (1951) (quoting *Federal Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544 (1927)); *see also General Talking P. Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938).

This Court must "leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality."[16]

And an assessment of the record for substantiality is precisely what Mattes desires. He claims that the Ninth Circuit "overlook[ed] material facts in critical areas where it expressly – but incorrectly finds that the record lacks substantial evidence on key elements"[17] and offers this Court his version of those facts and their significance to his claims. Many of these facts, Mattes boldly contends, are "undisputed." Indeed, he uses the word "undisputed" eight times in this subsection. For example, Mattes states, "It is undisputed that [Respondents] overcharged Petitioner for unsigned markers totaling $2.558 million."[18] But this contention is not merely disputed, it is one of the most-disputed contentions in this case.

Mattes also characterizes as "undisputed" the propositions that: 1) Respondents breached their agreement to let him continue to play at the Paris after he lost all of his money and his million-dollar credit line; 2) Respondents destroyed casino surveillance tapes despite the knowledge that Mattes wanted them preserved because he was going to file a lawsuit; and 3) witness testimony demonstrates that Mattes's reputation in the gaming community was damaged and "that he was unable to get credit as a result of [the Paris casino host's] comments that he was kiting checks." As the Ninth Circuit's opinion indicates, however, these facts were not just disputed, they were completely

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[16] *National Labor Relations Board*, 340 U.S. at 502.

[17] Petition at 10.

[18] Petition at 9.

belied by the evidentiary record, which reveals: 1) no proof – other than Mattes's self-serving testimony – that Paris "agreed that the credit line could not be revoked . . . or would be handled in a particular manner, and hence [there was] no meeting of the minds"[19]; 2) a complete absence of evidence that Paris was alerted to a potential claim or Mattes had asked Paris to preserve surveillance tapes;[20] and 3) that Mattes was never accused of check kiting; Paris merely voiced "its own concerns about check kiting."[21] Regardless, Mattes admitted that he was not accused of check kiting, and the only testimony about Mattes's credit difficulties in Las Vegas attributed his problems "to the lawsuit rather than to any accusation of check kiting."[22] Mattes's flippancy in misadvising this Honorable Court of the nature of the evidence and the proceedings below only highlights the baselessness of his petition.

A page-by-page review of a multi-ream record to scrutinize a circuit court's assessment of the evidence and potentially reverse an unpublished decision that impacts only one person is not what the certiorari process contemplates. As this Court held in *Layne & Bowler Corp. v. Western Well Works*, "it is very important" for the United States Supreme Court to "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and

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[19] Ninth Circuit Opinion, Appendix at 2a.

[20] *See supra* at p. 6.

[21] Appendix at 5a.

[22] *Id.* at 5a-6a.

authority between the Circuit Courts of Appeals."[23] Whether the 2,600-page record in this case contains enough evidentiary support for Mattes's claims that the jury verdict should not have been set aside or Mattes's claims should not have been disposed of on summary judgment is a matter of individual – not national – importance, and Mattes has identified no conflict of authority between any circuit courts. Supreme Court Rule 10 cautions, "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[24] Mattes has offered this Court no reason to conclude that his is one of those rare cases.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[23] 261 U.S. 387, 393 (1923).

[24] SUP. CT. R. 10.